Office Supreme Court,
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OCT 3 1983
ALEXANDER L. STEVAS
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No. 83-171

IN THE

Supreme Court of The United States

OCTOBER TERM 1983

TRANSAMERICA COMPUTER COMPANY, INC.
Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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September 30, 1983

QUESTIONS PRESENTED

This case turns on either settled law or unique facts unlikely to arise again. The questions presented are:

1. Should certiorari be granted to construe a stipulation, applicable solely to this case, that if the jury deadlocked (as it did) the trial judge would decide the case (as he did), when

(a) instead of objecting to the trial judge's deciding the case, petitioner joined in submitting it to him once the jury hung, later sought modification of the judge's decision without claiming deprivation of jury rights, then, having lost, waited until appeal to assert for the first time denial of a second jury trial;

(b) the stipulation was expressly meant to avoid the long, costly second trial petitioner now seeks; and

(c) the Court of Appeals, after reviewing the record, including transcripts of hearings where the stipulation was reached, found that petitioner consented unconditionally to the trial judge's deciding the case?

2. Should certiorari be granted to examine IBM's prices when, even if right, petitioner cannot win because the District Court found IBM entitled to judgment for reasons unrelated to pricing, namely that

(a) IBM neither possessed monopoly power in any market alleged by petitioner nor had attempted to monopolize, and

(b) petitioner failed to prove damages,

and when petitioner neither challenges those findings as "clearly erroneous" nor even addresses them?

3. Should certiorari be granted to review the Court of Appeals' conclusion that "[o]n this record, IBM was entitled to judgment as a matter of law," when Courts of

Appeals have reached the same result in *four* other cases involving substantially the same claims and facts?[1]

4. Should certiorari be granted to decide whether facts unique to this case present a "limit pricing" issue when

(a) the question is immaterial unless IBM had monopoly power, yet petitioner claims no error in the District Court's findings that it did not; and

(b) even though the Court of Appeals assumed monopoly power and applied the test petitioner proposes, the Court found the record did not present a limit pricing issue because entry barriers were low, competitors entered and took business from IBM, and petitioner "simply introduced evidence of an initial price cut" by IBM in response to that competition without introducing evidence that IBM later raised prices?

5. Should certiorari be granted to decide whether the "impact" of a new product on the revenues and profits of older products is part of the cost of the new product in determining whether it is priced below cost when

(a) petitioner has abandoned its below cost pricing claims and argues against all cost-based tests;

(b) a computer firm that fails to introduce new products will have its older products "impacted" adversely by its competitors' new offerings; and

(c) the "impact" evidence showed that, after taking into account the effect of new products on older ones, both were profitable, and their combined revenues and

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[1] *Telex Corp. v. IBM*, 510 F.2d 894 (10th Cir. 1975), *petition for cert. dismissed by stip.; Greyhound Computer Corp., Inc., v. IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (FTP issues only); *California Computer Products, Inc. v. IBM*, 613 F.2d 727 (9th Cir. 1979); and *ILC Peripherals v. IBM, 458 F. Supp. 423 (N.D. Cal. 1978), aff'd sub nom. Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). More recently, the Department of Justice dismissed *United States v. IBM* with the remarkable confession that its case, involving many of the issues in this case, was "without merit."

profits were greater than if the new products had not been introduced?

RULE 28.1 STATEMENT

Respondent International Business Machines Corporation has no subsidiaries (except those that are wholly owned) and it is not the subsidiary of any other company.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. The Industry

Petitioner itself provided an accurate description of the dynamics of the computer industry in a report to its parent's Board of Directors made in June 1971, shortly after most of the IBM acts complained of:

". . . [C]ompetition is quite significant in the expected life of any product we consider, largely because there are so many firms who are interested in making each other's life difficult. The frequency of entry into the data processing industry is quite high compared with any other industry, and there are usually, at any one time, more competitors than anyone would really like to have. The situation

is compounded by a continuing high rate of technological development. . . ."

The District Court agreed, finding that "[e]ntry barriers are low, and entry has been easy, frequent, and successful." (App. B at 30.)[2]

The "continuing high rate of technological development" referred to by petitioner has improved computer performance dramatically, and costs to consumers have plummeted despite runaway inflation. For example, 100,000 multiplications on an IBM computer cost $1.26 in 1952 and only $.007 in 1977. Storing one million characters of data on IBM disks cost $167.98 a month in 1963 and just $2.15 in 1976.

To be sure, not all new entrants have succeeded. Success requires capacity for fast-paced technological change, and not every firm has met the test. Failure of *individual competitors,* however, is the price of a vigorous *competitive process* — "the unrestrained interaction of competitive forces" that the antitrust laws foster to yield "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958).

B. IBM

IBM was one of the first to dedicate its resources wholeheartedly to the emerging computer field in the 1950s. IBM stressed product quality, but also education and support to help users select, install and efficiently use computers. As petitioner's economist testified, IBM not only participated in — it helped create — the computer market.

IBM consistently has been a leading technological innovator. One of its boldest innovations was System/360 in 1964. With System/360 IBM sought to develop an integrated

[2] This finding, like all others cited herein, is not attacked by petitioner as clearly erroneous and must be accepted for purposes of the petition. Citations to "App." are to the appendix to the petition and are the same in form as those in the petition.

family of computers — from small to very large — that could run on virtually the same software and perform "business" and "scientific" data processing interchangeably. Achieving these goals required radical departures from past technology and a dedicated commitment of resources. Facing substantial risks, IBM literally "bet the company" on System/360. The gamble was rewarded. Its vast price/performance improvements and flexibility made System/360 an extraordinary success.

C. PCM Competition

Ironically, System/360's success gave new competitors an opening to copy the IBM data storage devices that attached to the system's central processing units ("CPUs"). These competitors became known as "plug-compatible manufacturers," or "PCMs," because they designed their devices to "plug into" IBM CPUs, thereupon displacing IBM's devices.

As copyists, PCMs avoided matching IBM's investments in research and development and could offer lower prices. By copying only *successful* products, PCMs were assured of IBM-created demand and avoided the substantial losses IBM suffered when a new product flopped or a research program deadended. And, as vendors of peripheral devices instead of complete computer systems, PCMs escaped large software and systems support overhead costs.

PCM list prices typically ran 15 to 20 percent below IBM's. Widespread PCM discounts from list, 30 days' free rent, and free maintenance, transportation and accessory equipment increased the differential still further. As the District Court found, "PCMs, attracted by IBM's high profits on its peripherals, stormed these markets and flooded them with cheaper copies of the IBM gear." (App. B at 29.)

IBM predicted severe competitive losses unless its price/performance improved; many within IBM thought these loss projections were seriously understated. In the words of the District Court, "IBM, unable to maintain its relatively high price, was forced to react with lower prices and improved products." (Id.)

Between September and December 1970, IBM announced its 2319A and 2319B disk and its "Aspen" and "Mandan" tape storage units. All offered substantially better price/performance than previous IBM peripheral devices. Transamerica attacked the design and pricing of these products as anticompetitive.

The District Court found as facts that the 2319A and Aspen were of superior design; that Transamerica's attack on the 2319B had been "convincingly refuted"; and that any PCM could easily have duplicated Mandan. (App. B at 59-65.) The District Court also found that the prices of each of those products "exceeded average cost, were reasonable, and legal." (App. B at 57.)

PCMs countered by cutting prices further and sooner than IBM had projected. IBM's competitive losses continued to mount. By March 1971, IBM was achieving only 19% of planned monthly sales. IBM projected that the PCMs would win every sale at prices 23% below IBM's, yet some PCM prices had dipped as low as 37% below IBM's. The installation rate of PCM disk storage units directly competitive with the new products soared in the first five months of 1971. IBM disk installations correspondingly declined in April and May 1971. IBM reasonably projected that, unless its prices became more competitive, PCMs would displace 90% of IBM's leased installations of comparable disk units by the end of 1973.

At the same time, recession forced cutbacks by computer users and made PCM prices even more attractive. IBM's month-to-month leases, the only ones it offered, were easily cancellable, while PCMs mostly leased for a year or longer and offered discounted long-term leases of up to five years. IBM felt increasing pressure from customers — including its largest, the federal government — to offer reduced-rate long-term leases.

In late May 1971, IBM responded with the Fixed Term Plan ("FTP"), also attacked by Transamerica. FTP offered

what IBM's competitors had offered for years — lower rentals in exchange for a longer lease commitment.

The District Court found that "FTP reduced costs and increased revenues" and "was a manifestly reasonable reaction to competition." (App. B at 69.) The Court also found that none of the IBM prices challenged by petitioner "undercut the PCMs' prices, they did not even equal them, they merely closed the gap; the PCMs' prices were still lower." (App. B at 57.)

The PCMs' volume continued to increase. The District Court found that "PCMs enjoyed healthy increases in tape and disk placements and revenue from 1968 until 1975. PCMs' copies of [IBM's more advanced products], the equipment supposedly locked out to the greatest extent [by FTP], were by far their best seller. By 1976, PCMs had placed more of these devices than all of their older technology combined." (App. B at 69-70.)

D. Petitioner

Transamerica Computer Company, Inc. ("Transamerica") was formed in late 1967 as a wholly-owned subsidiary of Transamerica Corporation. Transamerica originally planned to purchase IBM System/360 computers with funds borrowed from Transamerica Financial Corporation, to use the investment tax credit to offset the parent's consolidated tax liability, and to lease out the computers at rates below IBM's. Competition from other leasing companies and technological advances soon shattered the plan's premise of long-term System/360 price stability.

When leasing company discounts reached 30% to 36% below IBM's monthly rental, Transamerica changed course, adopting a "master sales agreement" strategy. The plan was to purchase on-lease peripheral equipment from PCMs needing financing. In exchange, the PCMs were to service the equipment, remarket it as leases expired, and in general provide all operating services necessary for Transamerica to earn revenues. Transamerica needed this arrangement because it had no research, engineering, manufacturing,

marketing or maintenance resources. Once again, the money would be borrowed, and the key assumptions were stable prices and other market conditions. Transamerica invested huge sums, that it had borrowed at high interest, in copies of IBM products introduced up to ten years earlier.

This strategy permitted Transamerica could eke out a profit only if the market were so static that as many as three other firms could first skim off profits on technology already years out of date. Transamerica's 2319-type disk units, for example, were developed and manufactured by ISS, sold to Telex, resold to Transamerica, and financed at high interest by Transamerica Financial.

The District Court found that:

> "Transamerica's revenue aspirations were built on sand. They depended on others to perform essential services, when those others had little incentive to perform. They counted on a tax benefit that was later suspended. They assumed a continued demand for third generation peripherals at a time when the fourth generation was being born. They trusted incompetent and inexperienced management. They ignored the threat of competition from other PCMs and the deterioration of relations with their principal supplier. And they assumed that the antitrust laws had so stifled IBM that non-competitive pricing conditions would prevail indefinitely. Factors other than IBM's conduct were the predominant cause of Transamerica's lost revenues." (App. B at 86.)

E. Proceedings Below

After 120 days of trial and ten of deliberations, the jury was deadlocked, triggering a pretrial stipulation that the trial judge could decide the case if the jury could not. The parties submitted briefs and proposed findings of fact. Far from objecting, Transamerica willingly submitted the case to the trial judge, urging judgment in its favor. But the Court ruled otherwise and found for IBM on virtually every issue.

The District Court summarized its extensive findings and conclusions by saying:

> "Transamerica, charged with proving that IBM had monopoly power, that IBM's conduct violated the Sherman Act, and that such conduct caused injury to Transamerica, has failed to carry its burden of persuasion on each of those critical elements." (App. B at 92.)

The Court of Appeals affirmed. It found unnecessary a review of the District Court's conclusions that Transamerica had failed to prove monopoly power or damages because it held that IBM's conduct did not violate Section 2 even assuming monopoly power, that none of the District Court's findings was "clearly erroneous," and moreover that "IBM was entitled to judgment as a matter of law." (App. A.)

Transamerica's petition for rehearing was denied, and its suggestion for rehearing in banc was rejected, "no judge of the court [having] requested a vote on it." (App. E.)

REASONS FOR DENYING THE WRIT

I. TRANSAMERICA CANNOT DISAVOW ITS PRETRIAL STIPULATION THAT THE DISTRICT JUDGE WOULD DECIDE THE CASE IF THE JURY DEADLOCKED.

Trial of this case closely followed a five-month trial of substantially the same issues in *Memorex Corp. v. IBM, supra.* The *Memorex* jury had deadlocked, and the District Judge in that case had granted IBM's motion for judgment. Mindful of the *Memorex* experience, counsel and the judge in this case discussed ways to avoid a second trial if the *Transamerica* jury deadlocked. They agreed unconditionally that the judge would decide the case if the jury could not.

After the deadlocked jury was discharged, the parties prepared proposed findings of fact and post-trial briefs and submitted the case. Transamerica registered no objection to the trial judge's acting as trier of fact. On the contrary, it solicited findings and judgment in its favor without qualification or hint of objection.

Even after the trial judge found for IBM on virtually every issue, Transamerica showed awareness that nothing was amiss. Without questioning the judge's right or power to decide the case, Transamerica sought only to have him modify his opinion.

Then, on appeal, when the trial judge's views on the meaning of the stipulation could no longer be solicited, Transamerica reneged. It claimed for the first time that the stipulation did not apply because of alleged error in instructions to the discharged jury. Significantly, Transamerica did not claim reversible error in the District Court's findings of fact. The Court of Appeals found, after reviewing the record including transcripts of hearings where the stipulation was reached, that Transamerica had "freely and unconditionally" consented to the District Judge's deciding the case. (App. A at 4, n. 1.)

Transamerica's pretrial agreement expressly waived the second jury trial now sought. Avoidance of a second trial was the stipulation's very purpose.[3]

Transamerica's own conduct proves that the stipulation was carried out exactly as all had intended. Its submission of proposed findings, trial briefs and post-trial motions without the slightest objection contradicts the claim now made that the judge lacked power to decide the case. As this Court said in *Kearney v. Case*, 79 U.S. 275, 284 (1871), "it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver."[4]

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[3] See *Hanlon v. Providence College*, 615 F.2d 535, 537-38 (1st Cir. 1980) (no relief from a similar stipulation even after the trial judge received evidence withheld from the jury before the stipulation was reached).

[4] Acquiescence in a bench trial was also found to waive a jury in *Fiedler v. Marumsco Christian School*, 631 F.2d 1144, 1148-49 (4th Cir. 1980); *Southland Reship, Inc.* v. *Flegel*, 534 F.2d 639, 644 (5th Cir. 1976); and *National Family Ins. Co. v. Exchange Nat. Bank of Chicago*, 474 F.2d 237, 241 (7th Cir.), *cert. denied*, 414 U.S. 825 (1973).

II. CERTIORARI WOULD BE POINTLESS BECAUSE IBM PREVAILED BELOW FOR INDEPENDENT REASONS NOT CHALLENGED BY TRANSAMERICA.

A. IBM Did Not Have Monopoly Power.

Transamerica's case required proof that IBM misused monopoly power, and its petition is premised on the assertion that IBM was a monopolist. Yet the District Court found that IBM did not have monopoly power in any alleged market (App. B at 21, 30), and Transamerica asserts no error in that finding.[5]

B. IBM Did Not Attempt to Monopolize.

The District Court rejected Transamerica's attempt to monopolize claim, finding no predatory or anticompetitive conduct and holding that Transamerica "failed to prove that IBM acted with the specific intent to control prices or destroy competition," an essential element of its attempt claim. (App. B at 72.) Except for the misstatement that the District Court "made no findings regarding IBM's intent in pricing," Transamerica offers no reason why the findings are not binding.

C. Transamerica Did Not Prove Antitrust Damages.

Finally, the District Court found (and Transamerica fails to mention) that even if Transamerica had established liability "it would suffer an adverse judgment because its damage proof affords the factfinder no opportunity to calculate resulting injury without resort to speculation." (App. B at

[5] Transamerica would rescue itself by claiming the *jury* found monopoly power. Transamerica divines this "finding" solely from jury notes to the judge during deliberations. The premise of such a claim — that jury notes equate with jury verdicts — is false. A jury verdict must be returned and recorded in open court after an opportunity to poll the jury; votes in the jury room are preliminary and may be changed at any time before the jury is discharged; even after the verdict is announced, a juror may dissent when polled, forcing further deliberations or a mistrial. *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir. 1975); *Watsontown Brick Co. v. Hercules Powder Co.*, 265 F.Supp. 268, 277-79 (M.D. Pa. 1967), *aff'd*, 387 F.2d 99 (3d Cir. 1967) — a case indistinguishable from this one.

72-73.) Transamerica makes no claim that the damage findings are clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure.

Thus, even if right on everything it chooses to argue, Transamerica still must lose for reasons it never mentions. Moreover, the issues Transamerica addresses have been conclusively resolved in IBM's favor in no less than four other cases.

III. THIS CASE MARKS THE FIFTH TIME A COURT OF APPEALS HAS HELD THAT THE CONDUCT HERE IN QUESTION DID NOT VIOLATE SECTION 2.

In 1972, Telex Corp. was awarded a more than quarter-billion dollar judgment against IBM. *Telex Corp. v. IBM*, 367 F. Supp. 258 (N. D. Okla. 1973). Telex had been one of Transamerica's principal suppliers. Transamerica and a number of PCMs quickly filed cases based on the conduct Telex had attacked. But then *Telex* was reversed. *Telex Corp. v. IBM*, 510 F.2d 894 (10th Cir. 1975). No other plaintiff has succeeded, though the cases have clogged the courts for more than a decade. Transamerica's is the last of them.

Central to all cases has been whether IBM, even assuming monopoly power, violated Section 2 by responding to PCM competition with new products and reduced prices. Twenty federal judges — five from District Courts and 15 from Courts of Appeals — have examined the facts adduced in five trials lasting from 29 to 120 court days. Eighteen have concluded that IBM's conduct did not violate Section 2 *as a matter of law*. One held against IBM in *Telex* and was reversed. The other held for IBM as fact-finder in this case.

The unbroken line of decisions for IBM began in *Telex* when the Tenth Circuit reversed *per curiam*, saying of IBM's conduct:

> "There must be some room to move for a defendant who sees his market share acquired by research and technical innovations being eroded by those who market copies of its

products. It would seem that technical attainments were not intended to be inhibited or penalized by a construction of section 2 of the Sherman Act to prohibit *the adoption of legal and ordinary marketing methods already used by others* in the market, or to *prohibit price changes which are within the 'reasonable' range*, up or down." 510 F.2d at 927 (emphasis added).

Next, another Court of Appeals affirmed a *directed verdict* for IBM that IBM's Fixed Term Plan ("FTP"), also attacked by Transamerica, was a "reasonable response to . . . competition" even assuming IBM possessed monopoly power. *Greyhound Computer Corp., Inc. v. IBM*, 559 F.2d 488, 498-99 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

The third and fourth cases involved most of the IBM conduct challenged here and none different in kind. In *California Computer Products, Inc. v. IBM*, 613 F.2d 727 (9th Cir. 1979), the Court of Appeals affirmed a *directed verdict* for IBM, again assuming monopoly power. And the Court affirmed *per curiam* a judgment for IBM, entered by the trial judge after a jury deadlock, in *Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

A related case, *United States v. IBM*, was dismissed on January 8, 1982 by the Department of Justice with the concession that it was "without merit."

The Court of Appeals decided this case as the courts had decided each of its predecessors, holding that "even assuming that IBM possessed monopoly power in the relevant market, its lease plan, design changes, and pricing policy did not constitute unreasonable restrictions on competition. On this record, *IBM was entitled to judgment as a matter of law.*" (App. A at 17; emphasis added.)[6]

[6] Transamerica misstates the law in asserting that the Court of Appeals could not properly find for IBM as a matter of law because the District Court denied three IBM motions for directed verdict. No court has held that a trial court's denial of a directed verdict forecloses an appellate court from reaching the opposite result. On the contrary, it may do so in the appropriate case. *Epoch Producing Corporation v. Killiam Shows, Inc.*, 522 F.2d 737, 748-49 (2d Cir. 1975),

IV. TRANSAMERICA'S PRICING CLAIMS ARE MERITLESS.

A. Transamerica's Arguments Rest on Assertions of "Fact" It Could Not Prove Below.

The bulk of the petition discusses Transamerica's pricing claims[7]. The discussion is almost abstract, as if no need existed to relate the claims to the facts. For example, Transamerica assumes throughout that IBM was a monopolist, hence constrained by Section 2 in reducing prices. But Transamerica lost the monopolization issue below on the facts and gives no reason why that adverse finding should be held clearly erroneous.

Transamerica simply ignores the District Court's finding that "IBM did not control prices, it reacted to prices set by others." (App. B at 21.) Transamerica sidesteps the decisive fact in this case and in its predecessors: IBM reduced prices to meet burgeoning competition. It did not undercut its rivals or price any product below cost no matter how defined. It acted competitively, not preclusively.

B. IBM's Reasonable Response To Competition Did Not Violate Section 2.

No court has ever ruled Section 2 violated by price reductions to meet lower prices of competitors regardless of market share. Even a dominant firm can compete. The Ninth and

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cert. denied, 424 U.S. 955 (1976) (district court's denial of defendant's motion for directed verdict held error; judgment for defendant ordered). The reason is simple. Whether a verdict should be directed is a *question of law. O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975); *United States v. Bucon Construction Company*, 430 F.2d 420, 423 (5th Cir. 1970); *Willits v. Yellow Cab Co.*, 214 F.2d 612, 615 (7th Cir. 1954); *Roche v. New Hampshire Nat. Bank*, 192 F.2d 203, 205 (1st Cir. 1951).

[7] Those claims have a checkered history. After *Telex* was reversed, Transamerica jettisoned its claim of "literal identity of issues" with *Telex* and announced it would prove something new — below cost pricing. That issue became "the most fundamental part" of Transamerica's case. Having failed to prove that IBM's prices were below cost, Transamerica now argues that cost-based tests are not even pertinent.

Tenth Circuits so held in all prior IBM cases. The cornerstone of those decisions was that IBM reacted to lower PCM prices. All other Section 2 cases are in accord: *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982) ("It is not anticompetitive for a company to reduce prices to meet lower prices already being charged by competitors"); *William Inglis, etc. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982) ("Price reductions that constitute a legitimate, competitive response to market conditions are entirely proper"); *Fleetway, Inc. v. Public Service Interstate Transportation Co.*, 72 F.2d 761, 763 (3rd Cir. 1934), *cert. denied*, 293 U.S. 626 (1935) (no monopoly or attempt to monopolize where defendant's price reduction was "necessary to hold the normal trade which it had before the plaintiff entered the field"); *Knuth v. Erie-Crawford Dairy Cooperative Ass'n*, 326 F.Supp. 48, 52-53 (W.D. Pa. 1971), *aff'd in pert. part*, 463 F.2d 470 (3rd Cir. 1972) (rebates to meet competition and protect market position were *"the time-honored and legally sanctioned method of meeting competition"* and to outlaw them would "turn the shelter of the antitrust legislation into a weapon which would kill free enterprise instead of protecting and promoting it") (footnote omitted, emphasis added); *Dollac Corp. v. Margon Corp.*, 164 F. Supp. 41, 64 (D.N.J. 1958), *aff'd*, 275 F.2d 202 (3rd Cir. 1960) ("The very right to compete in a free market presupposes a right to lower prices in good faith to meet the prices of one's competitors on comparable articles of manufacture").

C. IBM Did Not Lower Prices, Drive Out Competition, And Then Raise Prices.

Many courts, including the trial and appellate courts in this case, have said that "[p]redatory pricing occurs when a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits at a later time." (App. A at 9. *See also* App. B at 35.) Transamerica contends that this "limit pricing" test is correct. But, as the Court of Appeals observed, Transamerica's proof did not meet the test, even

assuming IBM had the monopoly power that is a prerequisite to its application. Thus:

1. IBM's price reductions did not undercut PCM prices. (App. A at 16, n. 19; App. B at 57.)

2. "Transamerica did not, for example, introduce evidence that IBM's prices rose once competition had left the market." (App. A at 16.)

3. As the District Court found and the Court of Appeals stated, entry barriers to the peripherals market were "extraordinarily low."[8] Competitors were not limited. "Entry was easy for anyone with a good idea and the courage to exploit it, and new entrants, along with the old, grew and prospered." (App. A at 16, n. 19; App. B at 21, 29.)

4. Observing that Transamerica's pricing proof was indistinguishable from the proof in *California Computer Products, Inc. v. IBM, supra* ("CalComp") the Court of Appeals held, as it had in *CalComp*, that a limit pricing issue was not presented. (App. A at 17, n. 19.) "Transamerica simply introduced evidence of an initial price cut, hardly an unusual act in the computer industry or unusual in the face of competition." (App. A at 16-17.)

Transamerica claims that the "clearest example of limit pricing" is IBM's long term lease plan — FTP. (Petition at pp. 26-27.) Transamerica underscores the futility of its limit pricing argument by relying on *Greyhound* as applying "the correct test." (Petition at 27, n. 28.) *Greyhound* held FTP *legal as a matter of law* because it was a "reasonable response to . . . competition." So did the courts in all other IBM cases of which Transamerica's is the latest and last clone. A

[8] "Limit pricing" has economic significance only when entry barriers are high. Where they are low, new competition will emerge when prices rise. *Richter Concrete Corp. v. Hilltop Concrete Corp., supra,* 691 F.2d at 824; *Northeastern Telephone Co. American Telephone and Telegraph Co.,* 651 F.2d 76, 89 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *Pierce Packing Co. v. John Morrell & Co.,* 633 F.2d 1362, 1366 (9th Cir. 1980); *Hanson v. Shell Oil Co.,* 541 F.2d 1352, 1358 fn.5 (9th Cir. 1976), *cert. denied,* 429 U.S. 1074 (1977).

similar practice was found not to violate Section 2 in *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76, 91-93 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

D. All of IBM's Prices Were Above Full Cost.

One may debate the significance of the correlation between prices and costs or which costs — marginal, variable, or total — are relevant, but IBM's reduced prices without doubt were expected to, and did in fact, yield a profit. The District Court compared IBM's prices with its *total* costs, variable and fixed. It found all of IBM's products were priced to return a substantial profit. (App. B at 46-57.) The question was not even close. (App. B at 56, n. 101.)

Whether the price-cost relationship controls the issue of predation or is only an important factor, whether burdens of proof shift depending on such relationships, IBM's prices were not illegal by any standard. No case has ever found predatory conduct based on profitable prices. Even assuming in theory that profit-making prices could be illegal under some circumstances, such circumstances are not present here because IBM was found not to have monopoly power and to have no more than responded to its competitors' lower prices by reducing its prices to levels that showed a profit but did not undercut those of its rivals.

IBM's prices did not violate Section 2 under any test ever conceived, unless one accepts the notion, lurking behind Transamerica's contentions, that a firm with supposed monopoly power violates the law simply by operating.

Transamerica argues that the Ninth Circuit should have reversed because it believed above-cost prices *could* be predatory in certain cases. But the District Judge, assuming IBM's monopoly, found that IBM's prices would have been reasonable (and hence legal) even had they been "slightly below cost" because, among other things, they were responsive to competition. (App. B at 57.) A finding that IBM's prices in this case would have been reasonable even if below cost — a finding Transamerica does not attack as clearly

erroneous — precludes the possibility that they could have been found unreasonable at their actual profitable levels. The Ninth Circuit's embellishment on the appropriate test did not require remand or reversal because Transamerica did not meet any test of predation. The Court of Appeals properly found as a matter of law that IBM's prices did not violate Section 2.

V. NEITHER OF THE LOWER COURTS ERRED ON "IMPACT COSTS."

A new product may reduce revenues and profits that might otherwise have been earned on older products performing comparable functions. Transamerica was permitted to introduce evidence that the IBM products it challenged reduced IBM's revenues and profits on its older products and to argue that IBM impacted itself adversely with the new products. But the District Court rejected Transamerica's attempt to count the profit reduction on older products as a "cost" of the new products in determining whether IBM had priced the new products below cost.

Transamerica's impact cost contention, even if sustained, leads nowhere. The evidence showed that after introduction of the new products, both they and the older products were profitable. In fact, the combined revenues and profits of the new and older products exceeded those projected for the older products alone. By offering only older technology, IBM would have deprived itself of profit and its customers of advanced products.

The District Court disallowed counting the reduction in profit on an older product as a "cost" of a new product because to do so would dampen innovation. Nowhere could such a result be surer than in the computer industry, where success demands constantly new technology. Transamerica failed because it stayed with old technology. A firm that lags in the race for ever better price/performance will lose as its older computer products are hammered in the marketplace by new offerings of its rivals. A firm either "impacts" itself by offering new, profitable products or allows competitors to

"impact" it with their new technology. To count as a cost the impact of a firm's own advances in technology would work against the competitive goals of the antitrust laws.

Finally, Transamerica's complaint rings hollow. Transamerica has abandoned its below cost pricing claim and now contends that cost based tests are inappropriate.

VI. TRANSAMERICA'S PETITION REHASHES EVIDENTIARY ARGUMENTS REJECTED BELOW.

The petition is laced with references to evidence that left jury, trial judge and appellate court unpersuaded. The facts have been found against Transamerica, and its request for review based on an account that contradicts the facts established below is reason enough to deny certiorari.

VII. CONCLUSION.

For the reasons stated, the Court should deny Transamerica's petition for writ of certiorari.

Respectfully submitted,

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September 30, 1983